Nos. 80-11 and 80-15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-11

J. GREGORY MERRION, *et al.*,

Petitioners,

v.

JICARILLA APACHE TRIBE, *et al.*,

Respondents.

No. 80-15

AMOCO PRODUCTION COMPANY, *et al.*,

Petitioners,

v.

JICARILLA APACHE TRIBE, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF THE COUNCIL OF ENERGY RESOURCE TRIBES, THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE SHOSHONE INDIAN TRIBE, THE ASSINIBOINE AND SIOUX INDIAN TRIBES, THE ARAPAHOE INDIAN TRIBE OF THE WIND RIVER RESERVATION, THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, THE CHEYENNE RIVER SIOUX TRIBE, AND THE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION AS *AMICI CURIAE* IN SUPPORT OF THE JICARILLA APACHE TRIBE

[List of Counsel on inside cover]

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HARRY R. SACHSE
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS & SACHSE
2030 M Street, N.W.
Suite 600
Washington, D.C. 20036
Counsel for the Shoshone Indian Tribe and the Assiniboine and Sioux Indian Tribes.

ROBERT A. WARDEN
(Counsel of Record)
LAWRENCE WHITE
KATHRYN E. PAULI
ROBERT A. HAZEL
PEABODY, RIVLIN, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for the Council of Energy Resource Tribes.

CHARLES A. HOBBS
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006
Counsel for the Arapahoe Indian Tribe of the Wind River Reservation and the Three Affiliated Tribes of the Fort Berthold Reservation.

BERTRAM G. HIRSCH
76-17 250th Street
Bellerose, New York 11426
Counsel for the Association on American Indian Affairs, Inc.

JOSEPH G. TROISI
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, South Dakota 57625
Counsel for the Cheyenne River Sioux Tribe.

STEVEN S. ANDERSON
ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT
208 Pioneer Building
600 1st Avenue
Seattle, Washington, 98104
Counsel for the Confederated Tribes of the Colville Indian Reservation.

Counsel for Amici Curiae.

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The *amici curiae* identified below, on behalf of American Indian tribes with significant holdings of oil, gas,

coal, and other energy and mineral resources, file this brief with the consent of all parties as provided in Rule 36.2 of the Rules of this Court.

THE INTEREST OF THE AMICI CURIAE

The *amici curiae* (collectively referred to hereinafter as "*amici*") are American Indian tribes with large reservations containing exploitable oil, gas, and other mineral deposits, a non-profit tribal association organized to provide legal, technical, and administrative support to member tribes, and the largest Indian-interest organization in the United States.

The tribes are the Shoshone and Arapahoe Tribes of the Wind River Reservation in Wyoming, the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana, the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota, the Cheyenne River Sioux Tribe in South Dakota, and the Confederated Tribes of the Colville Indian Reservation in Washington. On each of these tribal reservations, mineral lands are held by the United States in trust for the tribes and developed under mineral leases (including oil and gas leases) approved by the Secretary of the Interior pursuant to federal statute and regulation.

The tribes exercise political sovereignty over reservation lands and provide standard governmental services to tribal members and others who use reservation lands. The tribes expend substantial amounts of their own tribal funds administering mineral leasing programs, evaluating requests to lease, blocking tribal tracts into leasing units attractive to potential bidders, negotiating the terms and conditions of mineral agreements, collecting and auditing royalty payments, and regulating the environmental effects of mineral resource development on tribal members and tribal land.

The tribes believe that some part of these costs can and should be recovered in taxes. Comparable expenses incurred by the United States on public lands or by states on state-owned land are recouped through taxation. At issue in this case is the power of one tribe—the Jicarilla Apache—to impose a severance tax for that purpose on private oil and gas lessees operating on tribally-owned land. To the extent that this case raises general issues concerning the power of Indian tribes partially to defray the administrative costs of leasing programs and to raise general tribal revenues through tax levies of this sort, all tribes with energy resources have an important and immediate interest in the manner in which these issues are resolved.

Also participating as *amici curiae* are the Council of Energy Resource Tribes and the Association on American Indian Affairs, Inc., non-profit organizations that provide assistance to tribes having title to extensive energy holdings in the United States. CERT was formed in 1975 to assist member tribes in managing and developing their energy resources within the constraints imposed by economic and environmental conditions on the nation's Indian reservations. CERT also provides technical assistance in energy resource management and related financial, legal, and legislative areas. Many CERT members[1]

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[1]The member tribes of CERT are: The Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Blackfeet, the Cherokee Nation, the Chippewa-Cree Tribes of the Rocky Boys Reservation, the Crow, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation, the Hopi, the Jicarilla Apache, the Navajo Nation, the Nez Perce, the Northern Cheyenne, the Pueblo of Acoma, the Pueblo of Jemez, the Pueblo of Laguna, the Pueblo of Santa Ana, the Pueblo of Zia, the Rosebud Sioux, the Salish and Kootenai Tribes of the Flathead Reservation, the Shoshone-

[footnote continued]

partially finance their mineral leasing programs by imposing tribal taxes on production activities undertaken by private lessees on tribal lands.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

INTRODUCTION AND SUMMARY OF ARGUMENT

In their briefs on the merits,[2] petitioners attack the Jicarilla severance tax on three broad grounds: first, that Indian tribes do not possess an inherent right to tax the activities of non-tribal members on Indian lands; second, that even if such an inherent right once existed, it was taken away when Congress enacted legislation in 1927 implicitly giving exclusive taxation authority to states and localities; and third, that even if the right of Indian tribes to tax the severance of energy resources does exist and has not been limited by Congress, the manner in which the Jicarilla Tribe drafted and implemented this particular severance tax offends the Commerce Clause[3]

Bannock Tribes of the Fort Hall Reservation, the Southern Ute, the Spokane, the Three Affiliated Tribes of the Fort Berthold Reservation, the Ute Tribe of the Uintah and Ouray Reservation, the Ute Mountain Ute, and the Yakima Nation.

[2] For ease of reference, the petitioners' brief in No. 80-11 will be cited as "Merrion Brief," and the petitioners' brief in No. 80-15 will be cited as "Amoco Brief."

[3] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. Const. art. I, §8, cl. 3.

by imposing a multiple burden on interstate commerce and discriminating against interstate commerce.

In Part I of the Argument, *amici* argue that Indian tribes, as an aspect of inherent tribal sovereignty, have the authority to levy taxes on the reservation activities of non-tribal members. The power of an Indian tribe to tax transactions within the boundaries of its reservation is a fundamental attribute of sovereignty retained by the tribe. This Court so held in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980), one of the most recent in a long line of decisions recognizing a unique sovereign status for Indian tribes with respect to matters significantly involving a tribe or its members. Tribal sovereignty has been carefully fostered as a policy of the federal government. The power to tax is a fundamental attribute of sovereignty. No court has ever suggested that American Indian tribes have relinquished that power.

Part II of the Argument focuses on the legislative history of the 1927 Indian Leasing Act.[4] Section 3 of the 1927 Act[5] permits the imposition of production taxes by state and local taxing authorities. Although petitioners concede that the Act does not explicitly preclude severance taxation by Indian tribes, they argue that Congress implicitly intended to bar tribal taxation as part of a "compromise" necessary to secure passage of the Act.[6] But there is no support for such a compromise in the legislative history, and petitioners' argument presupposes far more Congressional discord over the substance of the 1927 Act than is shown by the record of debate.

The petitioners' argument, furthermore, incorrectly assumes that the 1927 Act is invariably the pertinent

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[4] Act of March 3, 1927, §§1-5, 25 U.S.C. §§398a-e (1976).

[5] 25 U.S.C. §398c (1976).

[6] Merrion Brief, p. 31; Amoco Brief, p. 20.

statute. Today, all Indian mineral leases—including the Jicarilla leases at issue in this case—are negotiated under the more comprehensive Indian Leasing Act of 1938,[7] a statute that makes no mention of state taxation and was obviously not intended to bar taxation from any other source.

Finally, in Part III of the Argument, *amici* briefly examine the analytic approach used by petitioners in mounting their challenge to the Jicarilla severance tax on Commerce Clause grounds. The petitioners do not recognize the distinction between the interstate commerce clause and the Indian commerce clause, two Constitutional provisions with different histories and distinct purposes. The Indian commerce clause was designed by its framers to provide protection to the members of Indian tribes by interposing the Federal Government's regulatory authority between tribes and states.

The petitioners, by using the standard analysis applicable in interstate commerce clause cases, strike the wrong balance between the interests of three sovereigns—federal, state and tribal—affected by a tribal tax.

ARGUMENT

I.

TRIBAL POWER TO TAX TRANSACTIONS SIGNIFICANTLY INVOLVING TRIBAL INTERESTS IS A FUNDAMENTAL ATTRIBUTE OF SOVEREIGNTY RETAINED BY THE TRIBES.

A. This Court's Recent Decision in *Colville* Explicitly Established that the Power to Levy Tribal Taxes is a "Fundamental Attribute of Sovereignty."

The petitioners argue that the power to tax activities by non-tribal members on tribal lands is not part of the

[7] Act of May 11, 1938, §§1-6, 25 U.S.C. §§396a-g (1976).

retained sovereignty of an Indian tribe, but rather an attribute of the tribe's territorial power as a landowner to exclude non-Indians from tribal lands.[8] The petitioners also argue that tribal taxation is inconsistent with the "dependent status" of modern Indian tribes and reflects a "platonic" notion of tribal sovereignty.[9]

These very arguments were rejected by this Court just last term when it ruled in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980), that several tribes (which had both Executive Order and treaty reservations) had the power to impose a tax on non-Indians purchasing cigarettes on tribal lands. The Court held:

> At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on non-tribal purchasers. We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.

100 S.Ct. at 2080-81 (footnote omitted).

The petitioners in No. 80-15 seek to distinguish *Colville* from this case by arguing that the nature of the tax imposed by the Colville tribe is different from the severance tax levied by the Jicarilla Apache. The Colville tax on the sale of cigarettes, argue petitioners, "was based on the tribe's power to exclude non-members from the reservation or to attach conditions to their entry." The

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[8]Merrion Brief, pp. 12-22, 26-27; Amoco Brief, pp. 7-15.

[9]Amoco Brief, p. 10 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)).

Jicarilla tax, by contrast, "cannot be justified as an exercise of the Tribe's power to exclude."[10]

The distinction between taxes derived from a tribe's status as landlord and taxes imposed as an attribute of tribal sovereignty is one of petitioner's own making; it finds no support in the case law, and indeed is inconsistent with a well-established line of cases confirming the governmental authority of Indian tribes beyond their powers as mere landowners. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Court reversed a lower court decision that—like petitioners' argument here and Judge Seth's dissenting opinion in the court below—would have effectively limited tribal powers to those of landowners or private clubs. The Court sustained a tribal ordinance regulating the sale of liquor on fee-patented reservation lands owned by non-Indians. In an opinion written by Judge Seth, the Tenth Circuit in *Mazurie* had concluded that Congress could not delegate regulatory authority over non-Indians to Indian tribal councils. The Court of Appeals reasoned that Indian tribes, by excluding non-Indians from membership, could not "exercise any degree of governmental authority or sovereignty over other citizens who do not belong . . . , *other than as landowners*. . . ."[11] This Court specifically considered and rejected Judge Seth's analysis:

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations," and [this] undermine[s] the rationale of the Court of Appeals' decision.

419 U.S. at 557. Because the case concerned Indians on fee lands, the Court relied on the tribe's governmental authority, rather than its proprietary interest as a land-

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[10]Amoco Brief, pp. 8-9.

owner, in sustaining Congress' grant of regulatory authority to the tribal council. *See also Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

Several decisions since *Mazurie* have reaffirmed the governmental status of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Indian tribes held immune from suit); *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Colville*, the Court described the tribe's "power to tax transactions occuring on trust lands and significantly involving a tribe or its members" as "*a fundamental attribute of sovereignty* which the tribes retain." 100 S.Ct. at 2080-81 (emphasis added). Indeed, no attribute of sovereignty is more fundamental than the power to tax. Unless Indian tribes are to be perpetually dependent on federal largesse, they must develop their own tax base. Industries doing business on trust lands of the reservations, and thus benefitting most directly from reservation resources, and adding most directly to the cost of tribal government, are clearly an appropriate part of this tax base.

B. Federal Energy Policy is not Compromised by the Levy of a Tribal Severance Tax.

There is no merit to petitioners' suggestion that a conflict exists between the concept of tribal taxation and our emerging national energy policy because a tribal severance tax may affect the economics of production and raise the cost of oil and gas for consumers.[12]

Initially, it bears emphasis that Indian economic development and the preservation of Indian sovereignty are themselves preeminent national policy goals. *White*

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[11] *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973), *rev'd*, 419 U.S. 544 (1975) (emphasis added).

[12] Amoco Brief, pp. 28-29; Merrion Brief, pp. 28-29.

Mountain Apache Tribe v. Bracker, 488 U.S. ____, 100 S.Ct. 2578, 2583-84 n.10 and accompanying text (1980);[13] *Bryan v. Itasca County*, 426 U.S. 373, 389 n.14 (1976).

The petitioners provide no factual foundation for their assertion that the Jicarilla tax would have an adverse impact on federal energy policy.[14] The petitioners also

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[13] For example, the Indian Financing Act of 1974, 25 U.S.C. §1451 *et seq.*, states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U.S.C. §461 *et seq.*, whose "intent and purpose . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' "

White Mountain Apache Tribe v. Bracker, supra, 100 S.Ct. at 2583-84 n. 10.

[14] The record evidence in support of petitioners' claim that imposition of a tribal severance tax will cause wells to shut down is scanty at best. The trial court found that "the plaintiffs would have the right under their contractual provisions to pass the majority of the burden of the Jicarilla gas severance tax, if valid, onto their customers." J.A. 130. In addition, an expert economist retained by the Jicarilla Tribe reported to the trial court that if the tax were passed on, the increase in the average *annual* natural gas bill for residential customers would be approximately 74 cents in New Mexico and 15 cents in California. That report was never challenged or refuted. *See* Appellant's Brief in Chief in the Tenth Circuit, pp. 11-13.

The trial court also found that the Jicarilla oil and gas severance tax would raise over $2 million annually. Finding of Fact No. 32, J.A. 130. That amount is insignificant in relation to the annual earnings of petitioners, but it constitutes fully half of the Jicarilla Tribe's annual budget for government services. *See* Def. Exh. P. in the Trial Court.

[footnote continued]

overlook the impact of state severance taxes on oil and gas production within their borders. New Mexico, in fact, imposes six different production taxes on oil and gas. In light of the myriad taxes imposed by the states, it is ludicrous to argue that the Jicarilla tax undermines the national interests in promoting the development of domestic oil and gas resources and curbing energy costs. If heavy state taxation of energy resources is consistent with federal energy policies, how can a comparatively minor Indian tax conflict with those policies?[15]

Finally, section 110 of the Natural Gas Policy Act of 1978[16] contains a specific allowance for Indian severance taxes. Under the NGPA, the ceiling price for natural gas may be exceeded to the extent necessary to recover severance taxes imposed by states *and Indian tribes*, provided those taxes are applied uniformly both to natural gas sold within the state of production and to natural gas sold outside that state.

The Conference Report on the NGPA states:

> While severance taxes which may be imposed by an Indian tribe are to be treated in the same manner

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In 1978, Americans spent $160 billion on oil and gas. U.S. Department of Energy, Energy Information Administration, *Annual Report to Congress, 1979*, Vol. III, at 145 (1980). The partial decontrol of domestic oil and gas prices has already increased that amount by many billions of dollars annually. It is highly unlikely, therefore, that the Jicarilla severance tax will have any measurable impact at all on oil and gas prices in this country.

[15] If the answer is that state taxation may also interfere with federal energy policy or that a combination of state and tribal taxes, each reasonable when standing alone but unreasonably large in the aggregate, might threaten overall federal policy, then there is a short and complete rejoinder. Congress exercises plenary power over the rights of states and Indian tribes to impose taxes on mineral resources. Congress is in a far better position than the federal courts to assess and balance the competing economic interests of states, tribes, energy producers and energy consumers.

[16] 15 U.S.C. §3320(c) (Supp. III 1979).

> as State imposed severance taxes, the conferees do not intend to prejudge the outcome of the cases on appeal before the Tenth Circuit Court of Appeals respecting the rights of Indian tribes to impose taxes on persons or organizations other than Indians who are engaged in business activities on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes.[17]

Given Congress' plenary power over Indian affairs, including the power to deny the Jicarilla the right to impose a severance tax, it is not conceivable that Congress would have taken a position of neutrality with respect to the Jicarilla tax if, as petitioners assert, the taxing power of the Indians were inconsistent with national energy policy.

C. The Tribal Power to Levy a Severance Tax is not "Unfettered," But is Subject to Legal and Practical Limitations.

There is no basis for petitioners' cavil that the decision below will erode state tax bases and subject oil and gas companies to "unfettered" taxation by tribal governments.[18] The exercise of sovereign power by tribal governments is subject to review and control by the federal government in several ways. The Jicarilla severance tax, for example, was approved by the Secretary of the Interior (as required by the tribal constitution) before it went into effect. Additional protection is provided by the waiver of tribal immunity from civil suit in paragraph 13 of the taxing ordinance.[19] And even if the Secretary and the federal courts approved an unreasonable taxing ordinance, Congress would still have plenary power to delimit tribal taxing authority. The specter of non-Indians being

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[17] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 91, *reprinted in* [1978] U.S. Code Cong. & Adm. News 8983, 9007.

[18] Amoco Brief, p. 13; *see* Merrion Brief, p. 10.

[19] The ordinance is reproduced at Amoco Brief, pp. 17a-18a.

placed at the financial mercy of tribal governments with unfettered taxing power is entirely imaginary.[20]

II.

THE LEGISLATIVE HISTORY OF THE 1927 ACT IS DEVOID OF ANY INDICATION, EXPRESS OR IMPLIED, THAT CONGRESS INTENDED TO PREEMPT TRIBAL TAXATION BY GRANTING STATES AN EXCLUSIVE STATUTORY TAXING POWER.

The 1927 Indian Leasing Act was one in a series of measures authorizing oil, gas and mineral leasing on lands under federal control, including Indian lands. The 1927 Act filled a void in existing law by authorizing oil and gas leasing on Indian reservations created by Executive Order. Section 3 of the Act contained language common to all these statutes permitting states and localities to tax the output of oil and gas leases.

The parties agree that the 1927 Act did not expressly withdraw or limit the inherent authority of Executive Order tribes to levy a tax on oil and gas production. The parties also acknowledge that the Act's legislative history does not specifically evince such an intent. The petitioners claim, nonetheless, that Congress implicitly intended Section 3 to preclude tribal taxation and manifested that intent by adopting a "carefully crafted compromise" on the language of Section 3.[21] This tenuous argument is refuted by the well established principle that implicit abrogations of important Indian rights are heavily dis-

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[20]Indian tribes are of course well aware of the economic constraints on prohibitive levels of taxation. Tribes realize no energy revenue at all unless their resources are developed and their lands are leased. Private companies must be attracted to reservation lands, and the surest way of doing so is to offer favorable leasing terms and modest tax rates. Tribes with mineral resources depend significantly on lease payments as a source of tribal revenue, and are unlikely to jeopardize income from that source.

[21]Amoco Brief, p. 20.

favored, as well as by the legislative history of the 1927 Act itself and the language and history of earlier Indian and public leasing statutes.

A. Courts Do Not Favor Arguments Premised on Implicit Abrogation of Indian Rights.

Decisions of this Court create a stout presumption against implicit abrogation of Indian rights. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court rejected a claim that a Congressional grant of power to a state impliedly diminished Indian rights. The Minnesota Supreme Court had held that Congress, by enacting a grant of civil jurisdiction to the state coupled with an express exclusion of any state rights to tax real or personal property belonging to Indians and held in trust by the United States, had implicitly consented to other forms of taxation of Indians. In light of "the virtual absence of expression of Congressional policy or intent" respecting the grant of civil jurisdiction and "the total absence of mention or discussion regarding a Congressional intent to confer upon the states an authority to tax Indians or Indian property on reservations," 426 U.S. at 381, a unanimous Court observed that "nothing . . . remotely suggests that Congress meant the Act's extension of civil jurisdiction to the states should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations'. . . ." *Id.* at 388 (citation omitted). Therefore, concluded the Court, "we must be guided by that 'eminently sound and vital canon' . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 392 (citations omitted).

The principle that an intent to abrogate or diminish Indian rights should be very clearly stated has often been

applied to reject claims that Congress has implicitly diminished attributes of tribal sovereignty. Just last term, this Court stated that "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. ____, 100 S.Ct. 2578, 2583-84 (1980). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

In sum, "[t]he canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine v. Washington*, 420 U.S. 194, 199 (1975); *accord, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). Courts are reluctant to speculate on Congressional intent when the result would be to diminish rights of Indian self-government. The 1927 Act was no different from any other Indian act; it was remedial in intent, and should be construed in that spirit.

B. Placed in Proper Legislative Context, the 1927 Act Was Merely an Extension of Established Leasing Principles to Executive Order Reservations.

The petitioners argue that the 1927 Act represented a special and unique legislative compromise, under which states were given an exclusive power to tax oil and gas production from Indian mineral leases on Executive Order reservations and tribes were given the exclusive right to receive royalties.[22] The short answer to this argument is that the 1927 Act was not unique. By 1927, Congress had enacted a series of laws specifying the terms and conditions of mineral leasing on treaty reservations.

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[22]Merrion Brief, pp. 29-32; Amoco Brief, pp. 20-22.

These laws all gave full royalty rights to the tribes and consented to state taxation of leasehold revenues. Section 3 of the 1927 Act simply extended to Executive Order reservations what was by then a settled policy of allowing tribes to keep royalty payments and allowing states to tax the proceeds from federal oil and gas leases.

In the four-year period after 1920, Congress passed four separate acts involving leasing activities on treaty reservations.[23] In each case, the Act contained a provision allocating all royalties to the tribes and consenting to state taxation of leased interests. These provisions were nearly identical to the ones later contained in Section 3 of the 1927 Act. Not once were these provisions debated on the floor of either house. Not once did they provoke any semblance of a rift between states rightists and advocates of Indian sovereignty.

As matters stood in 1924, lands on treaty reservations could be leased to private developers, with Indians receiving the royalties and states permitted to tax mineral production. The arrangement common to all these leasing statutes was that tribes received royalties from mineral leases and states could tax mineral interests. The 1927

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[23] Act of March 3, 1921, §26, 41 Stat. 1249 (1921); Act of March 3, 1921, §5, 41 Stat. 1250 (1921); Act of April 28, 1924, 25 U.S.C. §401 (1976); Act of May 29, 1924, 25 U.S.C. §398 (1976).

The most important of these enactments was the last. The Act of May 29, 1924, amended an earlier 1891 Act which authorized mineral leasing on treaty reservations. The chief purpose of the 1924 Act was to lengthen the term of Indian oil and gas leases on these reservations, which had been fixed at ten years by the 1891 Act. Remarks of Senator Harreld, 55 *Cong. Rec.* 5492, 8597 (1924). The House Committee on Indian Affairs added a provision to the bill permitting state taxation, and the Interior Department did not oppose this addition. H.R. Rep. No. 386, 68th Cong., 1st Sess. 2 (1924) (letter of March 22, 1924, from Secretary of the Interior Hubert Work to Chairman Homer P. Snyder, House Committee on Indian Affairs). It passed without controversy.

Act followed this established pattern. No compromise was required to secure its passage.

C. The Legislative History of the 1927 Act Reveals No Trace of a "Compromise" Securing Exclusive Taxation Authority for the States.

The petitioners contend that the legislative history of the 1927 Act illustrates a schism between Indian advocates in the House, who wished to secure all royalty revenues for the tribes, and states rights advocates in the Senate, who wanted to allocate a portion of royalty revenues to the states.[24] The schism was resolved, petitioners contend, when states rightists agreed to allocate all royalties to the tribes in exchange for an implicit guarantee that states would be given exclusive authority to levy production taxes on private lessees.

This is not at all what happened. The legislative history shows clearly that Congressional sentiment was overwhelmingly in favor of allocating all royalty rights to tribes on Executive Order reservations, and that no "compromise" was ever necessary to ensure passage of the Act in that form.

To understand the fallacy in petitioners' argument, some appreciation of the history of Indian mineral leasing legislation is required. Prior to 1916, state efforts to tax the proceeds of private mineral development on federal and Indian lands were rebuffed by application of the "federal instrumentality" doctrine. In a series of cases decided soon after the turn of the century, this Court held that developers operating on public lands were "instrumentalities" of federal policy and were therefore insulated from state and local taxation.[25]

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[24]Merrion Brief, pp. 31-32; Amoco Brief, pp. 19-20.

[25]*United States v. Rickert*, 188 U.S. 432 (1903); *Choctaw, Oklahoma & Gulf R.R. Co. v. Harrison*, 235 U.S. 292 (1914);

These decisions prompted congressmen from energy-rich western states to address state taxing power in a number of federal and Indian leasing bills. One of the first of these was H.R. 406, introduced in the House of Representatives on December 6, 1915. The original bill contained a standard provision authorizing the Secretary of the Interior to promulgate implementing regulations. When the bill was marked up by the House Committee on Public Lands in early 1916, that provision was amended to include what appears to have been the first generally applicable consent to state taxation of leasing activities on federal lands.[26] When H.R. 406 was considered on the House floor in 1916, the Committee amendment containing the state taxing proviso was perfected and adopted by voice vote with virtually no debate.[27] Different versions of the bill subsequently passed the House and Senate,

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Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918) (per curiam); *Large Oil Co. v. Howard*, 248 U.S. 549 (1919) (per curiam).

[26] "[N]othing in this act shall be construed or held to confer or limit the rights of the States or other local authority from exercising any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee." 53 *Cong. Rec.* 1122 (1916). The legislative history shows that the proviso was prompted by a memorandum prepared in 1915 by the Chief of the Reclamation Service at the Department of the Interior. The memorandum purported to analyze the question "whether the exaction of a Government rental or charge will prevent the States wherein the lands are situate from taxing the improvements, rights, and interests or products of the permittees or lessees," and concluded that the states had broad common-law rights of taxation. The memorandum was widely circulated, but was quickly disavowed by Interior Secretary Franklin Lane, who characterized it as "the individual opinion of the writer, and . . . not a decision of this department in the broad sense. . . ." The resulting confusion apparently convinced the House Committee that legislative clarification was required. *Id.* at 1123-24.

[27] *Id.*

each containing the state taxing proviso; but the measure perished when the 63rd Congress ended before differences could be reconciled in conference.

Indian leasing legislation containing a similar state taxing proviso was considered by the 64th and 65th Congresses, and was ultimately enacted as the Act of June 30, 1919.[28] This Act, which authorized leasing of unallotted Indian lands (including Executive Order reservations) in named states for certain minerals—excluding oil and gas—was the first federal leasing statute to authorize state taxation. The legislative history of the 1919 Act reveals that the state taxing provision was barely debated, but was simply one of many provisions incorporated from earlier versions of the bill.[29]

The following year, Congress enacted the comprehensive Mineral Leasing Act of 1920 to rationalize and modernize the leasing of mineral rights on public lands.[30] Under the 1920 Act, royalty revenues were divided between the states and the federal government, with states receiving 37-1/2 percent of the royalties and the federal government the remainder.[31] Once again, without debate, Congress included a provision consenting to state taxation of lessees of public lands.[32]

The germ of petitioners' argument lies in what happened next. In 1922, President Harding's notorious Secretary of the Interior, Albert Fall, issued an opinion holding that Executive Order reservations were to be treated for purposes of mineral leasing like public lands

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[28] 25 U.S.C. §399 (1976).

[29] H.R. Rep. No. 4, 66th Cong., 1st Sess. 1-5 (1919).

[30] 30 U.S.C. §181 *et seq.* (1976).

[31] *Id.*, §35, 30 U.S.C. §191.

[32] *Id.*, §32, 30 U.S.C. §189. The state taxing provision was taken word-for-word from the final version of the 1919 Indian leasing act.

"owned by the United States" within the meaning of the 1920 Mineral Leasing Act.[33] The ruling created a simple and immediate problem. The 1920 Act allocated all revenues from mineral leases to federal and state governments. If the 1920 Act were deemed to apply to Executive Order Indian reservations, then Indian tribes with title to those reservations would realize no revenue from mineral leases on their lands. That result was inequitable, since under existing law tribes with *treaty* reservations were entitled to keep all revenues generated from mineral leasing activities.

When Hubert Work replaced Albert Fall in 1923, one of his first actions as Secretary was to repudiate the opinion of his predecessor and prepare draft legislation giving all royalty revenues on Executive Order reservations to Indian tribes.[34] In 1923, the Interior Department's draft bill was introduced as S. 876. Its purpose was succinctly described by Senator Harreld:

> Secretary Fall has made a ruling which embarrasses the present Secretary very much. He made a ruling that royalties or bonuses obtained from Executive Order Indian lands should be deposited to the credit of the United States. That ruling has not been followed in other cases.[35]

S. 876 passed the Senate in late 1924.[36] Early the next year, the House Committee on Indian Affairs amended the bill to add a state taxing proviso identical to the ones in the 1921 and 1924 treaty reservation acts.[37] As

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[33] *E. M. Harrison*, 49 L.D. 139 (1922), *reprinted in* Hearings on H.R. 9133 Before a Subcommittee of the House Committee on Indian Affairs, 69th Cong., 1st Sess. 73-77 (1926).

[34] *See* S. Rep. No. 669, 68th Cong., 1st Sess. 1-2 (1924).

[35] 66 *Cong. Rec.* 998-99 (1924).

[36] 66 *Cong. Rec.* 999 (1924).

[37] *See* note 23, *supra.*

amended, the bill passed the House in 1925.[38]

When it returned to the Senate, however, the bill was amended to include a division-of-royalties formula patterned after the formula in the Mineral Leasing Act of 1920. Under the formula 62-1/2 percent of the royalty revenues were to be allocated to Indian tribes and 37-1/2 percent were to go to the states; but the Senate also required the states to spend their share of the revenues for "the construction and maintenance of public roads or for the support of public schools or other public educational institutions" on Indian reservations.[39] The restriction displeased many in Congress who regarded the formula as inappropriate in the context of Indian lands and felt that the theoretical allocation of royalties between states and tribes was an empty formalism inconsistent with Congress' intent that tribes were to enjoy the beneficial interest from all of the royalties. The Senate therefore discarded the whole royalty formula, and it never reappeared in later drafts.[40]

This action, described by petitioners as a carefully crafted compromise between Indian advocates and pro-state forces, was not a compromise at all.[41] Under the

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[38]66 *Cong. Rec.* 2233-34 (1925).

[39]66 *Cong. Rec.* 5433 (1925). *See also Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, on S.1722 and S.3159*, 69th Cong., 1st Sess. 2 (1926).

[40]S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926).

[41]The *amici* must pause at this point to make two observations about petitioners' characterization of the legislative history. In the first place, the final version of Section 3 of the 1927 Act was never described by any of the participants as a compromise, a puzzling omission if petitioners are to sustain their contention that two factions engaged in the kind of give and take usually associated with a political compromise.

Second and more important, even if petitioners are correct in describing the 1927 Act as compromise legislation, there is nothing

[footnote continued]

formula in the early Senate version, the states did not have beneficial use of any revenue from Indian lands, since the 37-1/2 percent share of leasing revenues nominally given to the states had to be held in trust for Indian purposes. To imply, as petitioners do, that congressional Indian advocates insisted on 100 percent of the leasehold royalties and gave up their right to tax in order to seal the bargain is to distort the legislative history. Indian tribes would have received no benefit from such a compromise, since they already received beneficial use of 100 percent of the royalties.

As reported by the Senate in 1926, the bill contained the standard state taxing provision and deleted the royalty division formula in favor of the provision from the original House bill allocating all royalty revenues to the tribes. The Senate report merely noted that the state taxing provision was "the same as that of the Act of May 29, 1924, applicable to treaty reservations," and acknowledged that the state taxing provision from the original House version was more consistent with a half-century of congressional policy for Indian reservations than the approach first espoused by the Senate.[42]

The record of debate on the 1927 Act shows no discernible disagreement or compromise over royalties or state taxation. The record is wholly devoid of any explicit indication that Congress, by consenting to taxation by the states, thought it was necessarily taking rights away from the Indians. The 1927 Act was delayed by a controversy over whether Executive Order Indian reservations were "public lands." Congress conclusively resolved that question by treating Executive Order reservations (as

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in the legislative history to suggest that preemption of tribal taxation was part of the bargain. Tribal taxation, in fact, was never discussed in the House or Senate.

[42]S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926).

it had in the 1919 Act) *exactly* as it had treated reservations established by treaty: Indian tribes received all royalty and rental income, and the ordinary, commonplace authorization was given to states to tax production. States were given no special rights or powers respecting Executive Order Indian reservations that they had not already been granted by earlier Indian leasing acts. There was simply no special or unique "compromise" embodied in the Act to preempt Indian tribal taxation.

D. The 1938 Act is Wholly Inconsistent with Petitioners' Construction of the 1927 Act.

The main thrust of petitioners' briefs is that the state taxing provision in the 1927 Act preempts tribal taxation of oil and gas production on Indian lands. The argument ignores the fact that Congress did not stop with that Act. Eleven years later, Congress enacted a comprehensive Indian leasing statute that was designed to replace the haphazard patchwork of leasing laws in effect at that time.[43] By its terms, the 1938 Act authorized tribes to assume a far greater role in the supervision and implementation of the Indian leasing program. The Act also repealed all prior, inconsistent legislation.[44]

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[43]Act of May 11, 1938, 25 U.S.C. §§396a-g (1976). In 1937, the Department of the Interior proposed a major overhaul of existing leasing laws to bring them into conformity with the Indian Reorganization Act of 1934, 25 U.S.C. §461 *et seq.* (1976). In a letter to the Chairman of the Senate Committee on Indian Affairs, the Acting Interior Secretary wrote that the Department's draft legislation was designed "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes" and "to bring all mineral leasing matters in harmony with the Indian Reorganization Act. . . ." S. Rep. No. 985, 75th Cong., 1st Sess. 2-3 (1937). The draft legislation subsequently became the 1938 Act. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 323 (1942).

[44]Act of May 11, 1938, §2, 25 U.S.C. §396b (1976); *id.*, §7, 52 Stat. 348 (1938).

Today, the 1938 Act is the controlling Indian leasing law, and virtually all oil and gas leasing on tribal lands is now conducted under that Act and its implementing regulations. If the 1927 Act retains any vitality at all—an issue that was disputed by the parties in this Court and not decided by the Tenth Circuit—then two things, at least, are clear. First, the passage of comprehensive leasing legislation in 1938 without a state taxing provision and with a broad invitation to the tribes to assume a larger role in the supervision of oil and gas leasing seriously undercuts petitioners' argument that Congress intended—and still intends—to vest exclusive taxing power in the states.[45] And second, a decision premised upon construction of the 1927 Act assumes very little practical importance since virtually no Indian tribe—not even the Jicarilla Apache—currently leases under that Act.

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[45]The Tenth Circuit so held:

> Thus, Congress expressly provided that tribes like the Jicarilla Apache Tribe may, by proper constitutional and legislative means approved by the Secretary of the Interior, *see* 25 U.S.C. §476, determine the terms upon which they will lease their lands and regulate the operations of their lessees. Under these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation.

Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 548-49 (10th Cir. 1980) (footnote omitted).

III.

THE CONSTITUTION RECOGNIZES A DISTINCTION BETWEEN "INTERSTATE COMMERCE" AND "INDIAN COMMERCE" AND PETITIONERS IGNORE THAT DISTINCTION BY PREMISING THEIR CONSTITUTIONAL ARGUMENT ON CASES DECIDED UNDER THE INTERSTATE COMMERCE CLAUSE.

The *amici* offer a brief concluding comment on petitioners' argument that the Jicarilla severance tax violates the Commerce Clause by discriminating against and imposing a multiple burden on interstate commerce. In fact, the Jicarilla tax has neither effect on interstate commerce. The petitioners' arguments on these points were roundly rejected in the court below[46] and have been comprehensively addressed in the brief of the respondents. They will not be addressed in this brief.

Instead, *amici* devote their attention to a threshold issue: whether the traditional Commerce Clause analysis used by petitioners applies at all to the commercial activities and policies of Indian tribes. As petitioners correctly observe,[47] the issue has never been resolved by this Court. In *amici's* view, however, the Constitution itself distinguishes between "interstate commerce" and "Indian commerce,"and the distinction has not been lost on this Court in the past. For reasons of history and public policy, the Indian commerce clause has never been construed to impose the same restrictions on Indian tribal activities that are imposed on the states by the interstate commerce clause. The petitioners have failed to heed the reason for this important distinction.

The Commerce Clause is three clauses in one. In its most familiar form, the Commerce Clause defines the

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[46] *Merrion v. Jicarilla Apache Tribe, supra,* 617 F.2d at 544-46.

[47] Amoco Brief, p. 31.

respective roles of federal and state governments in regulating "Commerce . . . among the several States . . . ." The interstate commerce clause places limits upon the sovereign regulatory powers of the states in areas of commercial conduct extending beyond state boundaries. Its chief purpose was to end "anarchy and commercial warfare between states" that grew so severe after the Revolutionary War that it "came 'to threaten at once the peace and safety of the Union.'" *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 533 (1949) (quoting from Story, *The Constitution* §260). Under interstate commerce clause analysis, a state may not impose a tax that affects commerce unless the tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). This is the test the petitioners have applied to the Jicarilla severance tax in this case.

But this approach is based on a false premise – that all Commerce Clause cases are to be analyzed under the same standard, regardless of the type of commerce involved or the purpose of the Constitutional provision granting Congress ultimate authority to regulate that type of commerce. Traditional interstate commerce analysis does not apply when the "commerce" involved is foreign commerce instead of interstate commerce. In *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), this Court rejected the notion that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved," and required "more extensive constitutional inquiry" where states seek to tax foreign commerce. 441 U.S. at 446.

Interstate commerce and foreign commerce are not the only categories of commerce given Constitutional status.

The Commerce Clause also grants Congress the power to regulate "Commerce . . . with the Indian Tribes," a grant of authority with a history and purpose all its own. Under the Articles of Confederation, primary jurisdiction over the commercial activities of Indian tribes within state boundaries had been given to the states. In *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), this Court contrasted the power of Congress and the states over Indians under the Articles of Confederation and the Constitution. It observed that in the Articles, "two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." 93 U.S. at 194. The Court concluded:

> [O]f necessity, these limitations rendered the power of no particular value. This was seen by the Convention which framed the Constitution . . . . The only efficient way of dealing with the Indian Tribes was to place them *under the protection of the General Government.*

Id. (emphasis added).

State control over Indian commerce under the Articles was replaced by a Constituional provision that "provid[ed] that intercourse and trade with the Indians should be carried on solely under the authority of the United States." *Id.*[48] From the beginning, then, Indian commerce was perceived as something separate and distinct from other forms of commerce, as Chief Justice Marshall stated in one of the earliest analyses of the Commerce Clause:

> In this clause, [Indian tribes] are clearly contra-distinguished, by a name appropriate to them-

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[48] *See also* J. NOWAK, *et al.*, CONSTITUTIONAL LAW 131 (1978); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 467-68 (1941).

> selves, from foreign nations, as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, *neither can the application distinguishing either of the others be, in fair construction, applied to them.*

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (emphasis added).

The Indian commerce clause serves a purpose different from the interstate commerce clause. It benefits a specifically identified group – members of Indian tribes – by interposing the protective jurisdiction of the federal government between tribes and state governments. *Cf. Morton v. Mancari,* 417 U.S. 535, 552 (1974). This unique purpose must inform and guide analysis under the Indian commerce clause. That clause does not impose any inherent limitations on the commercial power of *Indian tribes,* as petitioners seem to believe; rather, it places a limitation on the authority of *states* to interfere in the exercise of sovereign tribal power. It would be ironic indeed if the Indian commerce clause were now allowed to become the tool for restricting that sovereign power.

The Constitution's framers were not concerned with limiting tribal authority to tax. Their design was to foster Indian commerce under federal protection and save it from state-imposed restrictions or infringements. The traditional interstate commerce clause analysis urged by petitioners is just as inappropriate in the context of tribal commerce as it was deemed to be in *Japan Line, supra,* in the context of foreign commerce.

Proper interpretation of the Indian commerce clause is only possible when the underlying purpose of that clause is understood: to benefit tribes, not states. To argue, as petitioners do, that limitations on tribal power

are somehow to be inferred from the existence of the Indian commerce clause, even when Congress has made no determination that such limitations are appropriate, is to misapply a constitutional provision whose basic purpose is to safeguard, rather than to limit, Indian tribal rights.

CONCLUSION

For all of these reasons, the decision of the Tenth Circuit Court of Appeals should be affirmed in all respects and the petitions for a writ of certiorari should be dismissed.

Respectfully submitted,

HARRY R. SACHSE
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS & SACHSE
2030 M Street, N.W.
Suite 600
Washington, D.C. 20036
Counsel for the Shoshone Indian Tribe and the Assiniboine and Sioux Indian Tribes.

CHARLES A. HOBBS
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006
Counsel for the Arapahoe Indian Tribe of the Wind River Reservation and the Three Affiliated Tribes of the Fort Berthold Reservation.

ROBERT A. WARDEN
(Counsel of Record)
LAWRENCE WHITE
KATHRYN E. PAULI
ROBERT A. HAZEL
PEABODY, RIVLIN, LAMBERT & MEYERS
A Professional Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for the Council of Energy Resource Tribes.

BERTRAM G. HIRSCH
76-17 250th Street
Bellerose, New York 11426
Counsel for the Association on American Indian Affairs, Inc.

JOSEPH G. TROISI
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, South Dakota 57625
Counsel for the Cheyenne River Sioux Tribe.

STEVEN S. ANDERSON
ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT
208 Pioneer Building
600 1st Avenue
Seattle, Washington, 98104
Counsel for the Confederated Tribes of the Colville Indian Reservation.

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